

**Cour
Pénale
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**International
Criminal
Court**

Original: English

No.: ICC-01/14-01/18

Date: 2 April 2024

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-Ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
THE PROSECUTOR *v.* ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA**

Public

Public Redacted Version of the “Response of the Common Legal Representative of the Former Child Soldiers to the ‘First Defence Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b)’” (No. ICC-01/14-01/18-2250-Conf, dated 7 December 2023)

Source: Office of Public Counsel for Victims (CLR1)

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers (the “Legal Representative” or the “CLR1”) herewith submits his response to the Yekatom Defence’s (the “Defence”) “First Defence Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b)” (the “Request”).¹ The CLR1 opposes the Defence’s Request in its entirety, and in particular the admission under rule 68(2)(b) of the Rules of Procedure and Evidence (the “Rules”) of the statements of the following witnesses: CAR-D29-P-6028, CAR-D29-P-6011, CAR-D29-P-6010, CAR-D29-P-6022, CAR-D29-P-6012, CAR-D29-P-6019, CAR-D29-P-6034, CAR-D29-P-6027, CAR-D29-P-6039, CAR-D29-P-6030, CAR-D29-P-6013, CAR-D29-P-6018, CAR-D29-P-6037, CAR-D29-P-7011, CAR-D29-P-6031, CAR-D29-P-6035, CAR-D29-P-6017, CAR-D29-P-6033, CAR-D29-P-6016 and CAR-D29-P-6024 (the “Prior Recorded Testimonies”), together with their associated exhibits.

2. The CLR1 opposes the admission of the Prior Recorded Testimonies on the ground that they: (a) relate to the acts and conduct of the Accused and (b) to issues that are materially in dispute; (c) are not cumulative or corroborative of oral testimony of other witnesses; (d) do not have sufficient indicia of reliability; and that (e) the interests of justice are not best served by their introduction under rule 68(2)(b) of the Rules. The Defence should instead either call these witnesses to testify *viva voce* or, in the alternative, seek the admission of their prior recorded statements under rule 68(3) of the Rules - to enable the other Participants to cross-examine them.

II. PROCEDURAL BACKGROUND

3. On 26 August 2020, the Presiding Judge of Trial Chamber V (the “Chamber”) issued the “Initial Directions on the Conduct of the Proceedings” (the “Initial Directions”) establishing that “[t]he participants are instructed to file applications under

¹ See the “First Defence Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b)”, [No. ICC-01/14-01/18-2213-Conf](#), 17 November 2023 (the “Request”).

Rule 68(2) and (3) of the Rules as soon as possible, latest by the deadline set for the Final Witness List".² As provided in the Initial Directions, "[o]bjections to applications under Rule 68(2) and (3) of the Rules, if any, shall be made at the time of their submission, within the applicable deadline under Regulation 34(b) of the Regulations. The Chamber will rule on applications under Rule 68(2) and (3) of the Rules as set out below".³

4. On 17 November 2023, the Defence filed its final list of witnesses and its list of evidence.⁴ On the same day, it also filed the Request, seeking the admission of 20 prior recorded statements under rule 68(2)(b) of the Rules.⁵

5. On 28 November 2023, the Prosecution filed the "Request for Variation of Time Limit pursuant to Regulation 35 to respond to the current and prospective Defence's Requests for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b) and Rule 68 (3)", seeking a time extension of one week.⁶ On the same day, the Common Legal Representatives of the Victims (the "CLR V") supported the Prosecution's request for variation of time limit and requested to be granted the same extension of time to file their respective responses.⁷

6. On 30 November 2023, the Chamber granted the Prosecution and the other Participants a one week extension of time to respond to the Request, and rejected extension of time to respond to the Defence's prospective similar requests.⁸

² See the "Initial Directions on the Conduct of the Proceedings" (Trial Chamber V, Presiding Judge), [No. ICC-01/14-01/18-631](#), 26 August 2020, para. 33.

³ *Idem*, para. 34.

⁴ See the "Yekatom Defence's List of Witnesses and Evidence", [No. ICC-01/14-01/18-2212-Conf](#), 17 November 2023, with Annex A, [No. ICC-01/14-01/18-2212-Conf-AnxA](#), Annex B, [No. ICC-01/14-01/18-2212-Conf-AnxB](#), Annex C, [No. ICC-01/14-01/18-2212-Conf-AnxC](#), and Annex D, [No. ICC-01/14-01/18-2212-Conf-AnxD](#).

⁵ See the Request, *supra* note 1.

⁶ See the "Prosecution's Request for Variation of Time Limit pursuant to Regulation 35 to respond to the current and prospective Defence's Requests for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b) and Rule 68 (3)", [No. ICC-01/14-01/18-2226-Conf](#), 28 November 2023.

⁷ See the Email correspondence from the CLR V dated 28 November at 11:36.

⁸ See the "Decision on the Prosecution Request for Extension of Time to Respond to Current and Prospective Requests under Rule 68(2)(b) and 68(3) of the Rules" (Trial Chamber V, Single Judge), [No. ICC-01/14-01/18-2229](#), 30 November 2023 (dated 29 November 2023), paras. 13-14.

III. CLASSIFICATION

7. Pursuant to regulation 23bis(2) of the Regulations of the Court, the present submissions are classified as confidential since the Request bears the same level of classification.

IV. SUBMISSIONS

1. Applicable law

8. Pursuant to rule 68(1) of the Rules, the Chamber has discretion to allow the introduction of previously recorded audio or video testimony of a witness provided that this would not be prejudicial to or inconsistent with the rights of the accused and that the requirements of one or more of the following sub-rules are met.⁹ The notion of “prior recorded testimony” “includes audio and video-recorded testimony, transcripts of a testimony of a witness and written statements taken under Rules 111 and 112 of the Rules”.¹⁰

9. Rule 68(2)(b) of the Rules establishes a “two-tiered” assessment for the introduction of a previously recorded testimony of a witness who is not present before the Chamber.¹¹ The Chamber may allow its admission, first of all, when the prior recorded testimony “goes to proof of a matter other than the acts and conduct of the accused”. Where this is the case, the Chamber has then to consider the factors set out in rule 68(2)(b), and any other factors deemed relevant under the circumstances - including whether the prior recorded testimony: (i) “relates to issues that are not materially in dispute”; (ii) “is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts”; (iii) “relates to background information”; (iv) “is

⁹ See the “First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules” (Trial Chamber V), [No. ICC-01/14-01/18-1833-Corr-Red](#), para. 16.

¹⁰ *Idem*, para. 23.

¹¹ See the “Judgment on the appeal of the Prosecution against Trial Chamber X’s ‘Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules’” (Appeals Chamber), [No. ICC-01/12-01/18-2222 OA4](#), 13 May 2022, paras. 48-49, and 81-82. See also the “First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules”, *supra* note 9, para. 20.

such that the interests of justice are best served by its introduction"; and (v) *"has sufficient indicia of reliability"*.¹² The list of factors provided by the Rules is *"non-exhaustive"*:¹³ *"each prior recorded testimony must be assessed case-by-case, and on the basis of the circumstances before the chamber"*.¹⁴

10. The prior recorded testimony should also be accompanied by the witness's declaration that *"the contents of the prior recorded testimony are true and correct to the best of that person's knowledge and belief"*,¹⁵ which has been witnessed by a person authorised by the Chamber or in accordance with the law and procedure of a State, as detailed in rule 68(2)(b)(ii) and (iii) of the Rules.

11. What constitutes prior recorded testimony that goes to proof of the acts and conduct of the accused may depend upon *"the nature of the charges in each case"*.¹⁶ The expression *"must be understood as referring exclusively to those actions of the accused which are described in the charges brought against him or her or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged"*.¹⁷

¹² See the "First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules", *supra* note 9, para. 36.

¹³ *Ibid.*

¹⁴ *Idem*, para. 35.

¹⁵ See, *inter alia*, the "First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules", *supra* note 9, para. 17.

¹⁶ See the "Judgment on the appeal of the Prosecution against Trial Chamber X's "Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules"", *supra* note 11, paras. 3 and 54.

¹⁷ See the "Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules" (Trial Chamber IX), [No. ICC-02/04-01/15-596-Red](#), 18 November 2016, para. 11. In the same vein, see also, *inter alia*, "First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules", *supra* note 9, para. 28; the "First Decision on the Prosecution's requests to introduce prior recorded testimonies under Rule 68(2)(b)" (Trial Chamber I), [No. ICC-02/05-01/20-612-Red](#), 2 March 2022, para. 15; the "Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68" (Trial Chamber VI), [No. ICC-01/04-02/06-1667-Red](#), 2 December 2016, para. 11; the "Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules" (Trial Chamber IX), [No. ICC-02/04-01/15-596-Conf](#), 18 November 2016, para. 11, also referring to the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") on Rule 92bis of the ICTY Rules of Procedure and Evidence.

12. To determine whether an issue is materially in dispute, the Chamber has to *“consider whether the prior recorded testimony relates to matters which are soundly and conceivably disputed between the parties, and are crucial, or of at least sufficient significance for the Chamber’s eventual determination of the charges against the accused in its judgment under Article 74 of the Statute”*.¹⁸

13. Pursuant to the relevant jurisprudence, the interests of justice are better served by the introduction of prior recorded statements when their admission allows, *inter alia*, to: *“(i) safeguard the expeditiousness of the proceedings; (ii) streamline the presentation of evidence; (iii) focus live testimony on those topics of greatest relevance to the proceedings; (iv) minimise cumulative in-court testimony on aspects which are expected to also be addressed by other witnesses; (v) save resources which may instead be utilised for other purposes and/or avoid witnesses having to travel in order to appear in court; and (vi) best serve the victims’ interests”*.¹⁹

14. When assessing these elements, the Chamber takes into account the nature and scope of the statements.²⁰ Additionally, in determining whether the admission of prior recorded statements aligns with the interests of justice, it is crucial to bear in mind that rule 68(2)(b) of the Rules is an exception to the principle of orality.²¹ Said provision should be used *“to streamline the proceedings where it can avoid the calling of witnesses whose evidence, in light of its content and significance to the case, does not need to be ‘tested’*

¹⁸ See the “Public redacted version of ‘Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68’, 2 December 2016, ICC-01/04-02/06-1667-Conf” (Trial Chamber VI), [No. ICC-01/04-02/06-1667-Red](#), 27 February 2017, para. 15. See also the “First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules”, *supra* note 9, para. 39; and the “Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules”, *supra* note 17, para. 15.

¹⁹ See the “First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules”, *supra* note 9, para. 41; and the “Public Redacted Version of the Decision on the Prosecution’s First, Second and Fourth Requests Pursuant to Rule 68(2)(b) of the Rules” (Trial Chamber VI), [No. ICC-01/14-01/21-507-Red](#), 21 October 2022, para. 23.

²⁰ See the “First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules”, *supra* note 9, para. 34.

²¹ *Idem*, para. 33.

through an oral examination of the witness at trial".²² However, the need to safeguard and expeditiousness of the proceedings and to streamline the presentation of evidence cannot be detrimental to the integrity of judicial fact-finding and trump the interests of justice.²³

15. For the purposes of rule 68(2)(b) of the Rules, the Chamber only conducts a preliminary assessment of whether the prior recorded statements have sufficient indicia of reliability.²⁴ An important factor in determining whether a prior recorded testimony shows "*sufficient indicia of reliability*" is "*the fulfilment of formal requirements at the time the prior recorded testimony is taken*".²⁵ The Appeals Chamber has clarified that "*Trial Chambers are not precluded from looking beyond formal requirements, if they consider it to be appropriate in a particular case*".²⁶ In turn, any examination of the content of a witness's prior recorded statement for the purposes of determining "*sufficient indicia of reliability*" is confined to establishing whether issues related to the credibility of the information provided are "*so manifest and of such a nature that the questioning of the witness at trial would be more appropriate than the introduction of the prior recorded testimony under Rule 68(2)(b) of the Rules*".²⁷

16. The introduction of a prior recorded testimony is not permitted if it is prejudicial to or inconsistent with the rights of the accused, as provided by rule 68(1)

²² *Idem*, para. 37. See also the "Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules", *supra* note 17, para. 7; and the "Judgment on the appeal of the Prosecution against Trial Chamber X's 'Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules'", *supra* note 11, paras. 3 and 55.

²³ See the "Judgment on the appeal of the Prosecution against Trial Chamber X's 'Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules'" *supra* note 11, para. 77.

²⁴ See the "First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules", *supra* note 9, para. 43.

²⁵ *Idem*, para. 45.

²⁶ See the "Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)'" (Appeals Chamber), [No. ICC-02/11-01/15-744 OAS](#), 1 November 2016, para. 104.

²⁷ See the "Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules", *supra* note 17, para. 19.

of the Rules.²⁸ In this regard, as discussed above,²⁹ consideration has to be given to the nature and scope of the statements³⁰ and to rule 68(2)(b) of the Rules being an exception to the principle of orality.³¹

2. The Prior Recorded Testimonies relate to the acts and conduct of the Accused

17. In accordance with the established jurisprudence,³² what constitutes prior recorded testimony that goes to prove the acts and conduct of the accused under rule 68(2)(b) of the Rules may depend upon “*the nature of the charges in each case*”.³³

18. The identifying information of the victims former child soldiers in the Anti-Balaka group, including their age, are material elements of the crime under Count 29 - namely the conscription, enlistment and use of children under the age of fifteen to participate actively in the hostilities. Therefore, all Prior Recorded Testimonies which refer to the identifying information, including the age, of the former child soldiers and/or aim to challenge the veracity of the identifying information of the former child soldiers directly pertain to the material elements of the charge under Count 29. This is even more the case when the Prior Recorded Testimonies aim to challenge the very presence of children under the age of fifteen in the Anti-Balaka group under Mr Yekatom’s command.

19. Some examples include:

- a. D29-P-6035 stating that “[REDACTED] n’ont jamais fait partie du groupe de YEKATOM lorsqu’ils vivaient à [REDACTED]. Ils n’ont jamais touché à une

²⁸ See the “First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules”, *supra* note 9, para. 33.

²⁹ See *supra* para. 14.

³⁰ See the “First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules”, *supra* note 9, para. 34.

³¹ *Idem*, para. 33.

³² See *supra* para. 11.

³³ See the “Judgment on the appeal of the Prosecution against Trial Chamber X’s ‘Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules’”, *supra* note 11, paras. 3 and 54.

arme".³⁴ This statement cannot be admitted under rule 68(2)(b) of the Rules because it goes to the acts and conduct of the Accused, in particular the recruitment and use of child soldiers by the Anti-Balaka group under Mr Yekatom's command.

- b. D29-P-6034, [REDACTED] - stating that V45-P-0001 ([REDACTED]) is the son of [REDACTED].³⁵ Said statement cannot be admitted under rule 68(2)(b) of the Rules because it concerns the identifying information of the former child soldiers and thus goes to the acts and conduct of the Accused.

20. In light of the above, the CLR1 submits that the Chamber should deny the admission under rule 68(2)(b) of the Rules of all Prior Recorded Testimonies pertaining to the material elements of the charge under Count 29, and thus to the acts and conduct of the Accused under said Count.

2. The Prior Recorded Testimonies do not merely relate to background information but pertain to issues that are materially in dispute

21. The Prior Recorded Testimonies do not merely relate to background information. Instead, they pertain to issues that are materially in dispute in these proceedings - in particular, the presence of children under the age of fifteen in the Anti-Balaka group under Mr Yekatom's command and the identifying information, including the age, of the former child soldiers. Therefore, all Prior Recorded Testimonies relate to issues that: (i) are of crucial relevance to the proceedings and their integrity, and to the Chamber's assessment of the entirety of the evidence presented at trial for its determination under article 74 of the Statute; and (ii) are also soundly and conceivably disputed between the Participants.

22. A few examples of the Prior Recorded Testimonies touching upon these particular issues include:

³⁴ See [CAR-D29-0009-0444-R01](#), para. 25.

³⁵ See [CAR-D29-0009-0372-R01](#), para. 21.

- a. D29-P-6013, [REDACTED] of OTP-P-2511 - stating that her [REDACTED] was not part of the Anti-Balaka.³⁶
- b. D29-P-6037, [REDACTED] of OTP-P-1974 - stating that [REDACTED] were older than herself,³⁷ and that she never heard that [REDACTED] were part of an armed group.³⁸
- c. D29-P-6033, an inhabitant of [REDACTED] - stating that V45-P-0002 was never part of the Anti-Balaka.³⁹
- d. D29-P-6016, [REDACTED] of OTP-P-2475 - stating that there is a several years difference between the dates of birth of [REDACTED].⁴⁰
- e. D29-P-6022, [REDACTED] - providing information about his communications with [REDACTED], the documents presented for the purpose of [REDACTED] with respect to V45-P-0001 and V45-P-0002, and the circumstances in which [REDACTED].⁴¹ Said statements pertain to V45-P-0001's and V45-P-0002's identifying information and grounds for D29-P-6022 [REDACTED].
- f. D29-P-6018, [REDACTED] of OTP-P-2475 - stating that OTP-P-2475 "*n'a jamais fait partie du group des Anti-Balaka*".⁴²
- g. D29-P-6011, [REDACTED] - suggesting that OTP-P-2475's [REDACTED],⁴³ and further stating that OTP-P-2475 was not registered at the school during the period [REDACTED].⁴⁴ Said statements pertain to OTP-P-2475's age and his credibility as a witness.

³⁶ See [CAR-D29-0009-0324-R01](#), para. 33.

³⁷ See [CAR-D29-0009-0459-R01](#), paras. 29-31.

³⁸ See [CAR-D29-0009-0459-R01](#), para. 30-31.

³⁹ See [CAR-D29-0009-0315-R01](#), paras. 31.

⁴⁰ See [CAR-D29-0009-0427-R01](#), para. 43.

⁴¹ See [CAR-D29-0009-0217-R01](#), paras. 18-49.

⁴² See [CAR-D29-0009-0396-R01](#), para. 23.

⁴³ See [CAR-D29-0009-0362-R01](#), paras. 23-25.

⁴⁴ *Idem*, para. 26.

- h. D29-P-6034, [REDACTED] - stating, among others, that V45-P-0001 ([REDACTED]) is the son of [REDACTED].⁴⁵
- i. D29-P-7011, [REDACTED] – [REDACTED] some of the exhibits which are the identification documents of former child soldiers.⁴⁶

23. Given the critical nature of confirming the presence of child soldiers under the age of fifteen in the Anti-Balaka group under Mr Yekatom's command for the purpose of the Chamber's determination on Count 29, the Prior Recorded Testimonies directly address issues that are materially in dispute. Therefore, the witnesses' statements concerning any of these matters should not be admitted under rule 68(2)(b) of the Rules, aligning with the established jurisprudence on the subject.⁴⁷ Alternatively, the Defense should either present the relevant witnesses for live testimony or request the admission of their prior recorded statements under rule 68(3) of the Rules. This approach would allow the other Participants the opportunity to cross-examine the witnesses and properly test the evidence.

3. The Prior Recorded Testimonies are not cumulative or corroborative of oral testimony of other witnesses

24. A prior recorded statement can only be admitted under rule 68(2)(b) of the Rules if it is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts. The Defence's recurring contentions that the proposed evidence is cumulative and corroborative of documentary evidence⁴⁸ are inapposite, as this is not enough to meet the requirement of rule 68(b)(2) of the Rules.

⁴⁵ See [CAR-D29-0009-0372-R01](#), para. 21.

⁴⁶ See page 5 of [CAR-V45-00000007](#), [CAR-D29-0015-0001](#), [CAR-D29-0015-0002](#), [CAR-D29-0015-0003](#), and [CAR-V45-00000004](#)

⁴⁷ See the "Public redacted version of 'Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68', 2 December 2016, ICC-01/04-02/06-1667-Conf" (Trial Chamber VI), [No. ICC-01/04-02/06-1667-Red](#), 27 February 2017, para. 15. See also the "First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules", *supra* note 9, para. 39; and the "Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules", *supra* note 17, para. 15.

⁴⁸ See the Request, *supra* note 1, *inter alia*, paras. 23, 27, 31, 39, 43, 47, 51, 59, 63, and 67.

24. The Defence calls only D29-P-6025 under rule 68(3) of the Rules and D29-P-6036 to testify *viva voce* on related topics. D29-P-6025, [REDACTED], is expected to testify merely about [REDACTED] alleged misconduct and involvement with the [REDACTED];⁴⁹ being V45-P-0001's [REDACTED];⁵⁰ V45-P-0001 being the son of [REDACTED],⁵¹ and being registered at [REDACTED].⁵² Although D29-P-6025's expected testimony touches upon some of the topics addressed in the Prior Recorded Testimonies of witnesses D29-P-6028, D29-P-6019, D29-P-6034, D29-P-6031, and D29-P-6017, this is not enough to make those statements of a corroborative or cumulative nature of D29-P-6025's anticipated testimony. In fact, most of the topics contained in the Prior Recorded Testimonies are not expected to be addressed by D29-P-6025.

25. Similarly, D29-P-6036, [REDACTED] of V45-P-0002 – is expected to testify merely on: OTP-P-2475 not being part of the Anti-Balaka group;⁵³ the children from [REDACTED] who partook in the ESF program not being conscripted in any Anti-Balaka group;⁵⁴ V45-P-0002's real name being [REDACTED];⁵⁵ and V45-P-0002 not being a member of the Anti-Balaka.⁵⁶ Although D29-P-6036's expected testimony touches marginally upon some of the topics addressed in the prior recorded testimonies of witnesses D29-P-6039, D29-P-6018, and D29-P-6033, it does not turn those into statements of a corroborative or cumulative nature of D29-P-6036's anticipated testimony. In fact, most of the issues addressed in the Prior Recorded Testimonies are not expected to be addressed by D29-P-6036.

26. Accordingly, the relevant statements cannot be admitted under rule 68(2)(b) of the Rules as they are not of a corroborative or cumulative nature of oral evidence expected to be provided by D29-P-6025 and D29-P-6036. Moreover, and as argued

⁴⁹ See Annex A to the "Yekatom Defence's List of Witnesses and Evidence", *supra* note 4, paras. 38-95.

⁵⁰ *Idem*, para. 27.

⁵¹ *Idem*, para. 24.

⁵² *Idem*, para. 27.

⁵³ See Annex C to the "Yekatom Defence's List of Witnesses and Evidence", *supra* note 4, p. 21, para. 21.

⁵⁴ *Idem*, p. 22, para. 28.

⁵⁵ *Idem*, p. 20, para. 2.

⁵⁶ *Idem*, p. 22, para. 30.

supra, all Prior Recorded Testimonies pertain to either the acts and conduct of the Accused or issues that are materially in dispute in the present proceedings, and thus cannot be admitted under rule 68(2)(b) of the Rules for this reason alone.

27. Lastly, the Defence's Request to admit [REDACTED] prior recorded statements related to Count 29 appears excessive in a context where orality is expected to be the norm, and the admission of written statements is considered the exception. Notably, the Defence intends to present only one live witness and one rule 68(3) testimony on Count 29. The disparity between the extensive number of the Prior Recorded Testimonies sought for admission and the limited number of live or rule 68(3) witnesses, raises concerns about proportionality - especially when compared to the overall number of the Defence's prospective witnesses, *i.e.* [REDACTED], and the number of the witnesses expected to specifically address Count 29, *i.e.* [REDACTED].

4. The interests of justice will be best served by calling the relevant witnesses to testify either *viva voce* or under rule 68(3) of the Rules

28. The interests of justice will be better served if the other Participants are permitted to cross-examine the relevant witnesses. This is necessary not only to test the evidence concerning issues that are materially in dispute in the present proceedings, but also to clarify the witnesses' accounts. It is in the very interests of truth-seeking and justice-making to further inquire with the concerned witnesses, *inter alia*, as follows:

- a. D29-P-6022, [REDACTED] - should be requested to clarify, *inter alia*: (i) [REDACTED] with respect to V45-P-0001 and V45-P-0002; (ii) whether [REDACTED] was required; (iii) why [REDACTED]; (iv) under which circumstances and on which grounds, D29-P-6022 [REDACTED].
- b. D29-P-6034, [REDACTED] - should be requested to clarify, *inter alia*: the type and source of information, [REDACTED].⁵⁷

⁵⁷ See [CAR-D29-0009-0372-R01](#), paras. 23-24.

- c. D29-P-6024, [REDACTED] - should be requested to clarify, *inter alia*: (i) the source of the identifying information contained [REDACTED], and (ii) whether the accuracy of said information was verified.

29. These few examples show that the other Participants should be allowed the opportunity to test the evidence and cross-examine the relevant witnesses whose prior recorded statements the Defence seeks to be admitted under rule 68(2)(b) of the Rules. The imperative to expedite the proceedings and streamline the presentation of evidence should not take precedence over the paramount truth seeking function of the Chamber and the victims' interest in their quest for justice.

5. The Prior Recorded Testimonies do not have sufficient indicia of reliability

30. Prior recorded testimonies under rule 68(2)(b) of the Rules bear sufficient indicia of reliability when they fulfil formal requirements at the time the prior recorded testimony is taken.⁵⁸ However, Trial Chambers are not precluded from looking beyond those formal requirements, if they consider it to be appropriate in a particular case.⁵⁹ In addition, the Chamber's examination of the content of a witness prior recorded statement for the purposes of determining "*sufficient indicia of reliability*" is confined to establishing whether issues related to the credibility of the information provided are "*so manifest and of such a nature that the questioning of the witness at trial would be more appropriate than the introduction of the prior recorded testimony under Rule 68(2)(b) of the Rules*".⁶⁰ In the present instance, it is submitted that the Prior Recorded Testimonies of several witnesses have manifest issues affecting the credibility and coherence of their respective accounts. Some examples include:

⁵⁸ *Idem*, para. 45.

⁵⁹ See the "Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)'" , *supra* note 26, para. 104.

⁶⁰ See the "Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules" , *supra* note 17, para. 19.

- a. D29-P-6039, [REDACTED] of V45-P-0002 - providing very general affirmations denying the membership of any of her family members in the Anti-Balaka group.⁶¹ These assertions remain ambiguous and are not substantiated enough to be considered *prima facie* reliable.
- b. D29-P-6037's statements, [REDACTED] of P-1974 - are mainly based on hearsay. She states, *inter alia*: “je n'ai jamais entendu non plus que [REDACTED] a fait partie d'un groupe armé”,⁶² “je ne sais pas pourquoi on a mis le nom de [REDACTED] sur la liste”,⁶³ “[j]’ai entendu le nom de [REDACTED] mais pas [REDACTED]”.⁶⁴ It is clear from these statements that she is not declaring about what she saw or know, but about what she has heard or assumed.
- c. D29-P-6033's statements, a [REDACTED] native - cannot be admitted because they are also based on hearsay on child soldiers' activities he did not attend. This includes: (i) a meeting with child soldiers at the end of [REDACTED], where [REDACTED] were allegedly present; and (ii) an alleged trip of [REDACTED] child soldiers, organised by [REDACTED], with no mention of the time, the destination, or even the name of the [REDACTED] child involved.⁶⁵
- d. D29-P-6033, an inhabitant of [REDACTED] - providing general assumptions that V45-P-0002 was never part of the Anti-Balaka group, merely based on the fact that V45-P-0002 was allegedly [REDACTED] and visiting [REDACTED] family house, at an unspecified point in time.⁶⁶ These statements are too vague and ambiguous to be considered *prima facie* reliable.

⁶¹ See [CAR-D29-0009-0545-R01](#), para. 20.

⁶² See [CAR-D29-0009-0459-R01](#), para. 26.

⁶³ *Idem*, para. 28.

⁶⁴ *Idem*, para. 30.

⁶⁵ See [CAR-D29-0009-0315-R01](#), paras. 27-29.

⁶⁶ *Idem*, para. 31.

- e. D29-P-6016, [REDACTED] of OTP-P-2475 - stating that there is a several years gap between the dates of birth of her [REDACTED],⁶⁷ while being unable to specify at least [REDACTED] year of birth. These statements are also too vague and ambiguous to be considered *prima facie* reliable.
- f. D29-P-7011's [REDACTED] cannot be admitted either. It lacks sufficient reliability [REDACTED]. This clarification affects [REDACTED] reliability. The witness needs to be cross-examined for an adequate evaluation of [REDACTED].

31. Accordingly, said Prior Recorded Testimonies do not bear sufficient indicia of reliability to be admitted under rule 68(2)(b) of the Rules.

6. Opposition to the admission of the Associated Exhibits

32. It is submitted that since, as argued *supra*, the Prior Recorded Testimonies cannot be admitted under rule 68(2)(b) of the Rules, the associated exhibits should not be formally submitted into evidence at this stage. Instead, the Defence could submit these items either from the "bar table" or through the relevant witnesses to be called as live witnesses or rule 68(3) witnesses.

33. The CLR1 notes that the Defence already sought the formal submission into evidence of several of these items following V45-P-0001's and V45-P-0002's testimony.⁶⁸ At the time, the CLR1 opposed their formal submission for the reasons

⁶⁷ See [CAR-D29-0009-0427-R01](#), para. 43.

⁶⁸ The relevant items: [CAR-D29-0014-0152](#), [CAR-D29-0013-0250](#), [CAR-D29-0013-0253-R01](#), [CAR-D29-0014-0159](#), [CAR-D29-0014-0160](#), [CAR-D29-0014-0162](#), [CAR-D29-0013-0254](#), [CAR-D29-0013-0265](#), [CAR-D29-0014-0165](#), [CAR-V45-00000004](#) (pages 4 and 6). See the Email correspondence from the Defence dated 26 September 2023 at 21:05. Items: [CAR-D29-0010-0161](#), [CAR-D29-0013-0256](#), [CAR-D29-0013-0266](#), [CAR-D29-0016-0157](#), [CAR-OTP-00000320](#), [CAR-D29-0013-0252](#), [CAR-V45-00000007](#) (pages 4 and 6). See the Email correspondence from the Defence dated 28 September 2023 at 13:22. Items: [CAR-D29-0009-0508](#) (which was previously numbered CAR-D29-0013-0256) and [CAR-D29-0009-0497](#) (which is composed of page 6 of [CAR-V45-00000004](#), and [CAR-D29-0009-0497](#)).

indicated in his emails,⁶⁹ and reiterates his objection to the admission of these items as associated exhibits to the Prior Recorded Testimonies.

FOR THE FOREGOING REASONS, the Legal Representative respectfully requests the Chamber to:

- **REJECT** the Defence's Request in its entirety.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to read 'D. Suprun', with a period at the end. The signature is written in a cursive, somewhat stylized font.

Dmytro Suprun
Common Legal Representative of the Former Child Soldiers

Dated this 2nd day of April 2024
At The Hague, The Netherlands

⁶⁹ See the Email correspondence from the CLR1 dated 29 September 2023 at 18:47, and 3 October 2023 at 17:55.